of the contract to be determined by the jury. But if there be no such engagement by the vendor, then the buyer, who has got an unsound or defective article cannot assert that he has failed to obtain all that for which he has contracted to pay. Mere inadequacy of consideration, without warranty, or fraud, is no defence to the payment of a bill or note, given for the purchase money of goods, and the unsoundness or defective quality of the article sold relates only to the inadequacy of the consideration.

There was error, therefore, in the instruction given to the jury by the court below. If the contract of sale was not fraudulent; if there was no deceit on the part of plaintiff, to which knowledge by him of the defect was essential, and if there was no express warranty, the fact that the mare was unsound constituted no defence to the action.

It is unnecessary to notice the second and third assignments of error, in detail. What we have already said is sufficient to express our views of them.

The judgment is reversed and a *venire de novo* is awarded.

In the Supreme Court of Pennsylvania—At Harrisburg.

THE NEW YORK AND WASHINGTON TELEGRAPH COMPANY *vs.* ANDREW DRYBURG.

1. It is the duty of the Telegraph Company to transmit the messages just as they are delivered to them. Should they not do so, they will be liable for any loss that may ensue by the wrong transmission.
2. Telegraph Companies, like other corporations, may be sued in their corporate character, for damages arising from neglect of duty.
3. Where the sender of a telegraphic message wrote "two *hund* bouquets," meaning two *hand* bouquets, and the agent of the Telegraph Company translated it "two *hundred*" bouquets, and so delivered the message to the person addressed, by which error he caused loss and damage: *Held*, that the person to whom the erroneous message was sent, could maintain an action in his own name, and that the company were liable for the loss or damage caused by such error in transmitting.
4. *Query*, whether the Telegraph Company should not be regarded as the agent of both the sender of and the person to whom the dispatch is addressed.
5. A servant, as such, cannot be charged for neglect, but the principal shall be charged for it; but for a misfeasance an action will well lie against the servant.

Error to the District Court of Philadelphia.

Dryburg sued the Telegraph Company to recover damages occasioned by their negligent transmission of a message sent to him from New York by Mr. Le Roy. The message in question was (in brief) an order to plaintiff (who is a florist) to send to New York, "*two hand bouquets.*" The message was erroneously sent over the wires by the operator, and was delivered by the company to Mr. Dryburg, "*send two hundred bouquets.*"

The message calling for two hundred bouquets, (and two additional ones) was received by the plaintiff below from the boy employed by the Telegraph Company, between two and three o'clock on the afternoon of Monday, 26th of November, and the counter-order explaining the blunder did not arrive until after one o'clock in the afternoon of the 27th, so that during that interval of time between the reception of the blundering message and the delivery of the corrected one, Mr. Dryburg had not only cut all the flowers in his own green houses, but had purchased in other directions, about $200 worth of flowers, on this order.

The facts, as disclosed by the evidence, appeared to be these. Robert Le Roy, a resident of New York, came to the office of the Telegraph Company in that city, on Monday, the 26th November, 1855, and left with the clerk, for transmission for him to Andrew Dryburg, a florist in Philadelphia, a message written as follows: "Send me, for Wednesday evening, two hund bouquets, very handsome, one of five and one of ten dollars;" and paid forty cents for telegraphing it. In the message as received at Philadelphia, the words "two hund bouquets," read "two hundred bouquets," and was so delivered to Mr. Dryburg. On the same day, Mr. Dryburg inquired of Mr. Le Roy, by telegraph, "are the two hundred bouquets intended for pyramids; are the five and ten dollar for the table or hand?" and he received from Mr. Le Roy, the same evening, the following reply: "I wrote simply two hand bouquets, and not two hundred. I want two bouquets for the hand—one at five, and the other at ten dollars."

The declaration contained three counts. In the first of them it is averred that the plaintiff carries on the business of a florist, in

Philadelphia, and that the defendants are engaged in transmitting messages, by means of the magnetic telegraph, from New York to Philadelphia, for reward; that on the 26th of November, 1855, Robert Le Roy, delivered a message or order to the defendants at New York, and paid the price for transmission and to be communicated by the telegraph to the plaintiff at Philadelphia, in these words: "New York, November twenty-sixth. Send me for Wednesday evening two hand bouquets, very handsome, one of five and one of ten dollars," and subscribed his name. That it was the duty of the defendants to transmit and communicate the message or order to the plaintiff correctly and faithfully, yet they did not so transmit and communicate it, but, on the contrary, did carelessly and erroneously transmit it, and transmitted and communicated to the plaintiff a different message, in these words: "New York, November twenty-sixth. Send me on for Wednesday evening two hundred bouquets, very handsome, one of five and one of ten dollars;" by reason of which he suffered damage.

In the second count it is averred, that a certain message was, at the date aforesaid, delivered to the defendants in New York, and by them accepted, and the price paid, for transmission and delivery to the plaintiff at Philadelphia, but that the defendants did not, nor would not transmit or communicate the said message to the plaintiff, but on the contrary did transmit and communicate the same to the plaintiff, erroneously, untruly and carelessly, by reason of which he suffered damage.

In the third count it is also averred, that a certain message was delivered to the defendants at New York, and by them accepted, and the price paid, for transmission and delivery to the plaintiff at Philadelphia, and that it was the duty of the defendants so to transmit and communicate it correctly and faithfully, but that the defendants, in disregard of their duty, transmitted and communicated the said message to the plaintiff erroneously, untruly and carelessly, whereby he suffered damage.

The defendants pleaded not guilty. The cause was tried on the 5th of January, 1859, and verdict rendered for the plaintiff, for one

hundred dollars, subject to the point of law, whether upon the whole of the evidence he was entitled to recover.

Guillou, for plaintiff.
W. S. Price, for defendant.

WOODWARD, J.—The Telegraph Company did not send Le Roy's communication as he wrote it. If written as the Company's agent read it, the word *hand* was written *hund*, and if the Company had sent the word *hund* to Dryburg, they would have been in no fault. Their agent, however, assumed that *hundred* was meant, and accordingly added the three letters, *r e d*, which did all the mischief. We do not understand that there was any dot after the letters *h u n d*, to indicate a contraction, so that the agent's inference that "hundred" was the word, was entirely gratuitous.

The wrong then, of which plaintiff complains, consisted in sending him a different message from that which they had contracted with Le Roy to send. That it was wrong is as certain as that it was their duty to transmit the message for which they were paid. Though telegraph companies are not, like carriers, insurers for the safe delivery of what is entrusted to them, their obligations, as far as they reach, spring from the same sources—the public nature of their employment and the contract under which the peculiar duty is assumed. One of the plainest of their obligations, is to transmit the very message prescribed. To follow copy, an imperative law of the printing office, is equally applicable to the telegraph office. But when they violate this duty, whether negligently or wilfully, are they responsible to the party to whom the erroneous message is addressed? That is the exact question upon this record. That the defendants would be responsible to Le Roy, and that he would be responsible over to Dryburg, are not contested, though perhaps not conceded points, but that the Company are liable to Dryburg is resisted on several grounds.

In the first place, it is said that the case belongs to that class of torts in which malice is the gist of the action.

This is a mistake. The law lays the duty to transmit the mes-

sage as it was received, and assigns as the breach that it was transmitted "erroneously, untruly and carelessly." No malicious intent was alleged, nor was it necessary that one should be alleged or proved. It is enough that negligence is charged and proved. It is settled upon abundant authority that incorporated companies may be sued in their corporate character for damages arising from neglect of duty and for trover. Chitty's Pl'g, 68, *Turnpike Co.* vs. *Rutter*, 4 S. & R. 6; *Fowle* vs. *The Common Council of Alexandria*, 3 Peters, 409; *Bushel* vs. *Ins. Co.*, 15 S. & R. 173. And a corporation is liable in tort for the tortious act of its agent, though the appointment of the agent be not under seal, if the act be done in the ordinary service. *Smith* vs. *Birmingham Gas Light Co.* 1 Adol. & Ellis, 526.

Apart, however, from corporation law, it is said, in the next place, that, upon the general principles of agency, the company can be held answerable to Le Roy only. That the relation of principal and agent existed between him and the company, there can be no doubt, but I do not think it equally clear that that relation was not established between Dryburg and the company. Telegraph companies are in some sort public institutions—open alike to all—and are largely used in conducting the commerce of the country. The banks decline to act upon their authority, and, doubtless, individuals may also decline, but, when a man receives a message at the hands of the agent of such a company, and does act upon it, especially if, as Dryburg did, he used the same medium for responding to the message, it seems reasonable that, for all purposes of liability, the telegraph company shall be considered as much the agent of him who receives, as of him who sends the message. In point of fact, the fee is often paid on delivery, and I am inclined to think the company ought to be regarded as the common agent of the parties at either end of the wire.

But, however this may be, regarding the company as alone the agent of the sender of the message, is it to be doubted that an agent is liable for misfeasance even to third parties? For nonfeasance, I agree, the agent is responsible only to his employer, because there is no privity of consideration betwixt the agent and a third party.

The remedy in such cases must be sought in the maxim *respondeat superior*. But even to this rule there is an exception in the instance of masters of ships, who, although they are the agents or servants of the owners, are, also, in many respects deemed to be responsible as principals to third persons, not only for their own negligence and nonfeasance, but for those of subordinate officers, and others employed under them. The general rule, however, was laid down by Lord Holt, in *Lane* vs. *Sir Robert Cotten*, 12 Mod. R. 485, in these words: "A servant or deputy, as such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not as a deputy or servant but as a wrong doer." S. C. 1 Lord Raymond, 646. The compilers have taken the rule from this source, and the cases cited by them show that it has generally been followed. See Paley on Agency, p. 396, et. seq., and Story on Agency, sections 308, 309, 314 and 315, and the cases in notes.

The case of *Camp* vs. *The Western Union Telepraph Co.*, 6 Am. Law Register, 443, does not affect this principle as we apply it here; for, there the action was by the sender of the message, and it appeared that the message was sent, subject to the express condition that defendant would not be liable for mistakes arising from any cause, unless the message was repeated by being sent back.

This company had such a rule, also, but they charge 50 per cent. advance upon the usual price of transmission, where the sender demands that the message be repeated back to the first operator, and Le Roy did not pay it. If it be granted that in consequence of his not purchasing this security against mistakes, *he* could not hold the company liable, it does not follow that Dryburg cannot. He did not know whether the message had been repeated back to Le Roy or not. He received it as the company delivered it to him, and it is very material to observe that the mistake was not due to what has been called the infirmities of telegraphing, but to the improper liberties which the operator took with the text before him. The magic power which presides over the wires performed its duty faithfully, and bore the very message it was bidden to bear, but the human agent sent a different message from that which he was commanded to send. This is the misfeasance the plaintiff complains of.

The company claimed that their operator was a skillful and careful one. Then his negligence in this instance was the more apparent and inexcusable. If the handwriting was so bad he could not read it correctly, he should not have undertaken to transmit it; but the business of transmission assumed, it was very plainly his duty to send what was written. It was no affair of his that the message would have been insensible. Messages are often sent along the wires that are unintelligible to the operator. When he presumed to translate the writing and to add letters which confessedly were not in it, he made the company responsible to Dryburg, for the damages that resulted from his wrong doing.

We do not conceive it necessary to go any farther in the discussion of this case. There are several errors assigned to which we have not specially alluded, but we see nothing in them to require a reversal of the judgment. Judgment affirmed.

In the Supreme Court of Texas—Austin Term, 1860.

THOMPSON ET AL., APPELLANTS *vs.* CRAGG ET AL., APPELLEES.
CRAGG ET AL., APPELLANTS *vs.* SMALLEY ET AL., APPELLEES.[1]

1. Under the Spanish jurisprudence and the principles of the laws of the Republic and State of Texas, the interests of the husband and the wife in the community property are severed by the death of either spouse, and the interest of the deceased partner vests at once in his or her heirs, subject only to the community debts.
2. Where the husband, (in Texas) after the death of his wife, (leaving children surviving) contracted to sell the community property and executed a bond for

[1] DIGEST OF THE SUBJECTS DISCUSSED:—1. Spanish law as to power of surviving spouse to dispose of the community property. 2. Three years Statute of Limitation of Texas. 3. Difference, under three years statute of Texas, between title and color of title discussed. 4. Partition—good faith—improvements. 5. Coverture and Limitation. 6. Panand *vs.* Jones, 1 Cal. R. 448, reviewed at length and held to be erroneous.

We publish this case at the request of some esteemed correspondents in Texas, who assure us that the questions discussed are of great magnitude and importance in that State and in California. The opinion of the learned judge is certainly marked by ability, and will not fail to command the attention of the profession in those sections of the union to which it is peculiarly applicable.—*Eds. Am. Law Reg.*